

# EXHIBIT “D”

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
:  
Application of Reuben Taub and :  
Hindy Taub, :  
Petitioners, :  
:  
Index No.116878/09  
For a Judgment Pursuant to CPLR :  
5225(b) and/or 5227 to Compel : Affirmation in Reply  
Payment of Money or Delivery of :  
Property :  
:  
against :  
:  
IRA DANIEL TOKAYER, :  
Respondent. :  
-----X

Daniel M. Hartman, an attorney licensed to practice before  
the courts of the State of New York, under penalty of perjury,  
affirms as follows:

1. I am the attorney for the petitioners herein and make  
this affirmation in reply to the respondent, Ira Daniel Tokayer.

2. Petitioners, judgment lien creditors of DVP Global  
Trading, LLC. ("DVP"), brought the instant proceeding to compel  
the respondent to turnover funds he holds in escrow belonging to  
DVP (the "DVP Funds"), the judgment lien debtor.

3. The funds paid by Carlin Owners Corp. "in the amount  
of \$485,000 to Respondent [were] **in full settlement of DVP**  
**claims**" in a litigation brought by DVP against Generic Trading  
et al. (Horan Aff. ¶ 3.) (emphasis added).

4. With the exception of the asserted charging liens, addressed below, the funds held by the respondent belonged to DVP, and DVP alone, until the petitioners obtained a judgment against DVP the Marshal served an execution and levy on those funds.

5. At that moment, the petitioners became judgment lienors and their claim took priority of all other claims to the DVP Funds.

6. The respondent does not dispute that he was properly served with the execution and levy for the DVP Funds, which created a perfected judgment lien in favor of the petitioners in the DVP Funds. (Affirmation of John R. Horan ("Horan Aff.") ¶¶ 1, 2.)

7. The respondent does not oppose the turnover of these funds, less his charging lien in the amount of \$8,013.19, and correctly believes that the petitioners' claim has priority. (Horan Aff. ¶¶ 3, 4, 8.)

8. The respondent forced this proceeding out of excess caution in light of turnover proceeding instituted by the trustee (the "Trustee") for the estate of Arbco Capital Management, LLP. ("Arbco"), a chapter 7 Debtor, in the United States Bankruptcy Court, Southern District of New York and charging liens asserted by the law firms of Moskowitz & Book and Yitzchak E. Cohen ("Cohen"). (Horan Aff., Ex. D.)

9. The Trustee merely seeks the turnover of the DVP funds from respondent and ***does not allege any personal liability against the respondent.*** (Horan Aff., Ex. D, ¶8.)

THE DVP FUNDS ARE NOT PROPERTY OF THE ARBCO BANKRUPTCY ESTATE AND NOT SUBJECT TO THE TRUSTEE'S TURNOVER COMPLAINT.

10. As shown in the petition, the funds held by the respondent do not constitute property of the Arbco bankruptcy estate and petitioners' perfected judgment lien makes the petitioners' interest prior to any claims that the Trustee has or may have asserted with respect to the DVP Funds.

11. Not only does the petitioner show that the DVP Funds are beyond the orbit of the Arbco bankruptcy estate, but a cursory review of the Trustee's turnover complaint shows that the DVP Funds are in a different galaxy altogether.

12. The remoteness of the DVP Funds from the estate is apparent.

13. The debtor is Arbco, and perhaps, under the theory of substantive consolidation asserted by the Trustee, another entity, Midwest Trading LLC, may also be treated as the Debtor. (Horan Aff., Ex. D. ¶ 14.)

14. But the only connection with the Debtor's estate and DVP is that they are both owned by Hayim Regensberg.

15. The DVP Funds does not implicate any "transfer", fraudulent or otherwise, in which the Debtor had an interest. 11 U.S.C. § 548.

16. The DVP Funds were paid to settle DVP's claims by Carlin Owners Corp., for the defendants in DVP's litigation with no connection or relationship with the Debtor.

17. There is no allegation by the Trustee DVP should be substantively consolidated with the Debtor.

18. A prerequisite to a turnover under 11 U.S.C. § 542 is that the property sought in the turnover must be property of the estate under 11 U.S.C. § 541. 4 Norton, Bankruptcy Law and Practice 3d, §62:3 (2008).

19. Since the DVP Funds are not property of the estate they are not properly the subject of the Trustee's turnover action.

20. Similarly, the respondent is not a custodian of property belonging to the Debtor's estate and is therefore not subject to the Trustee's turnover action under 11 U.S.C. § 543.

21. To be a custodian, respondent must have received property of the debtor, an assignee under a general assignment for the benefit of the debtor's creditors or have taken charge of the property of the debtor. 11 U.S.C. § 101(11).

22. None of these provisions apply to the respondent, who took possession of a non-debtor property, the DVP Funds.

23. The Trustee may not bootstrap claims against Regensberg to reach the DVP Funds, since even if the Trustee obtained a judgment in bankruptcy in an adversary proceeding against Regensberg, the Trustee might proceed to enforce that judgment against Regensberg's equity interest in DVP, but that equity interest is subsidiary and secondary to the petitioner's judgment lien claim to the DVP Funds.

24. In light of the above the court should order the turnover of the DVP Funds to the petitioners, less the respondent's charging lien.

MOSKOWITZ & BOOK AND COHEN DO NOT HAVE VALID CHARGING LIENS

25. While the petitioners would not object to the satisfaction of the respondent's charging lien out of the DVP Funds, the so called charging liens asserted by the two other attorneys, Moskowitz & Book and Itzhak Cohen, are not charging liens at all.

26. As sympathetic as one might be for attorneys seeking to collect their fees, Cohen may not assert charging liens since the statutory charging liens, pursuant to section 475 of the Judiciary Law, may only be asserted by attorneys of record. Rodriguez v. City of New York, 66 N.Y.2d 825, 498 N.Y.S.2d 351, 489 N.E.2d 238 (1993); Stinnett v. Sears, 201 A.D.2d 362, 607 N.Y.S.2d 646 (1<sup>st</sup> Dept. 1994).

27. Cohen did not appear as an attorney of record in the DVP action and is not entitled to a charging lien. (Ex. E.)

28. Furthermore, Moskowitz & Book appeared in the DVP action as the attorney for Daniel Ellen, a third-party "counterclaim defendant". (Ex. D, Verified Reply to Counterclaims.)

29. Under Judiciary Law § 475, an attorney has a lien "upon his client's cause of action, claim or counterclaim." By its very nature, a charging lien is limited to attorneys representing plaintiffs or defendants with counterclaims. Weinstein Korn and Miller, New York Civil Practice, ¶321.16 (2009); Ekelman v. Morano, 251 N.Y. 173, 167 N.E. 211 (1929); Goldman v. Rafel, Estates, 269 A.D. 647, 58 N.Y.S.2d 168 (1<sup>st</sup> Dept. 1945) (attorney representing a defendant with no counterclaim has no charging lien.); Krauss v. New Era Cab, Corp., 259 A.D.341, 19 (N.Y.S.2d 261 (1<sup>st</sup> Dept. 1940); Adan v. Abbott, 114 Misc. 2d 735, 452 N.Y.S.2d 476 (Sp. Ct. 1982) (attorney representing defendant had no interest in funds accruing to the plaintiff).

30. Daniel Ellen, Moskowitz & Book's client, asserted no cause of action, claim or counterclaim, he merely defended against the third-party claims asserted by the DVP defendants. (Ex. D, Verified Reply to Counterclaims.)

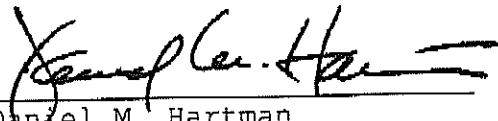
31. As a consequence, Moskowitz & Book are not entitled to a charging lien against the DVP Funds and the perfected judgment

lien of the petitioners take priority over their claims for an unsecured debt.

32. Furthermore, although the court has already restrained the respondent from transferring the DVP Funds, to avoid the need for unnecessary motion practice, the court should grant the petitioners' request for an order extending the effective period of the levy to preserve the petitioners' judgment lien until such time as the disposition of the DVP Funds is finally determined.

WHEREFORE, the petitioners respectfully request an order requiring the respondent to turnover the DVP Funds, less the respondent's charging lien of \$8,013.19, rejecting the charging lien claims of Moskowitz & Book and Cohen, and extending the effective period of the petitioners levy on the DVP Funds until such time as the disposition of those funds is finally determined and for such other and further relief as this court determines to be just.

Dated: January 19, 2010  
New York, New York

  
Daniel M. Hartman  
Attorney for the Petitioners  
489 Fifth Avenue, 28<sup>th</sup> Floor  
New York, New York 10017  
212-986-8600



# EXHIBIT D

Chaim B. Book, Esq.  
MOSKOWITZ & BOOK, LLP  
1372 Broadway, Suite 1402  
New York, New York 10018  
(212) 221-7999

Attorneys for Counterclaim-defendant Daniel Ellen

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

HAYIM A. REGENSBURG and DVP GLOBAL TRADING,  
L.L.C.,

Plaintiffs,

-against-

GENERIC TRADING OF PHILADELPHIA, LLC, CARLIN  
EQUITIES CORP., SHEAR OFFMAN, INC.,  
RONALD SHEAR AND DONALD MOTSCHWILLER,

Defendants.

GENERIC TRADING OF PHILADELPHIA, LLC, and CARLIN  
EQUITIES CORP.

Counterclaim-plaintiffs,

-against-

HAYIM A. REGENSBURG, DANIEL ELLEN and DVP  
GLOBAL TRADING, L.L.C.,

Counterclaim-defendants.

Index No.: 111582/03

**VERIFIED REPLY TO**  
**COUNTERCLAIMS**

**FILED**

APR 18 2007

NEW YORK  
COUNTY CLERK'S OFFICE  
**FILED**

APR 18 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Counterclaim-defendant Daniel Ellen, by his attorneys, Moskowitz & Book, LLP,  
for his answer to defendant's counterclaims, alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the  
allegations contained in paragraph 78 of the Counterclaims.
2. Admits the allegations contained in paragraphs 79 and 81 of the Counterclaims.

3. Denies the allegations contained in paragraph 82 of the Counterclaims, except admits that he was a registered trader of Generic during specified periods and that he traded securities for a generic proprietary account (other than account 4G71)
4. Denies the allegations contained in paragraphs 83, 84 and 85 of the Counterclaims.
5. Denies the allegations contained in paragraph 86 of the Counterclaims.
6. Denies the allegations contained in paragraph 87 of the Counterclaims, except admits the allegations of subpart (a).
7. Denies the allegations contained in paragraph 88 of the Counterclaims.
8. Neither admits nor denies the allegations contained in paragraphs 89 of the Counterclaims, but respectfully refers the Court to the Amended Complaint in this action.
9. Denies the allegations contained in paragraphs 90, 91, 92, 93, and 94 of the Counterclaims.
10. In response to paragraph 95 of the Counterclaims, plaintiffs repeat, reiterate and reincorporate each and every answer contained in Paragraphs 1 to 9 inclusive, as though fully set forth herein.
11. Avers that paragraph 96 of the Counterclaims alleges that a conclusion of law as to which no response is required.
12. Denies the allegations contained in paragraphs 97 through 107 of the Counterclaims.
13. In response to paragraph 108 of the Counterclaims, plaintiffs repeat, reiterate and reincorporate each and every answer contained in Paragraphs 1 to 12 inclusive, as though fully set forth herein.

14. Avers that paragraph 109 of the Counterclaims alleges that a conclusion of law as to which no response is required.
15. Denies the allegations contained in paragraphs 110, 111 and 112 of the Counterclaims.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

The counterclaims fail to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

Defendant/counterclaimants' claims are barred, in whole or in part, by principles of estoppel, waiver, and in pari delicto.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

Defendant/counterclaimants' claims are barred, in whole or in part, by the doctrine of unclean hands and laches.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

Defendant/counterclaimants' claims are frivolous and without foundation in fact.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

Defendant/counterclaimants' claim is being pursued in bad faith, for vexatious reasons and for purposes of harassing the Counterclaim Defendant.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

Defendants have sustained no damage, loss or injury as a result of any act or failure to act on the part of Counterclaim Defendant.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

Defendants' counterclaims are precluded under the doctrine of accord and satisfaction.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE

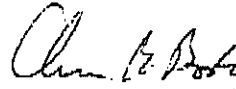
Defendants have failed to mitigate damages.

WHEREFORE, Daniel Ellen demands judgment dismissing the Counterclaims herein, together with costs and disbursements of this action, and such other relief as this Court deems just and proper.

Dated: New York, New York  
April 13, 2007

MOSKOWITZ & BOOK, LLP

By: \_\_\_\_\_



Chaim B. Book, Esq.  
Attorneys for Counterclaim Defendant  
Daniel Ellen  
1372 Broadway, Suite 1402  
New York, New York 10018  
(212) 221-7999

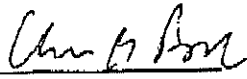
VERIFICATION

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

DANIEL ELLEN, being duly sworn, states that he is the Counterclaim Defendant in this action, that he has read the Complaint and that the foregoing is true to his knowledge, except as to matters which are stated to be upon information and belief and as to those matters he believes them to be true.

  
DANIEL ELLEN

Sworn to before me this  
16<sup>th</sup> day of April, 2007

  
Notary Public

CHAIM B. BOOK  
Notary Public, State of New York  
No. 02805062284  
Qualified in New York County 2010  
Commission Expires June 24, 2010

**FILED**

**APR 18 2007**

**NEW YORK  
COUNTY CLERK'S OFFICE**

# EXHIBIT E





## New York State Unified Court System

COURTS

Court: **New York Civil Supreme**  
Index Number: **111582/2003**  
Case Name: **REGENSBURG, HAYIM A. vs. GENERAL TRADING**  
Case Type: **Other Commercial**  
Track: **Standard**  
RJ Filed: **12/19/2003**  
Date NOI Due: **12/30/2007**  
NOI Filed:  
Disposition Deadline:  
Disposition Date: **01/14/2008**  
Calendar Number:  
Jury Status:  
Justice Name: **CAHN, HERMAN**

## Attorney/Firm For Plaintiff:

**IRA DANIEL TOKAYER, ESQ.**  
**42 WEST 38TH STREET - RM 802**  
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**1-212 695-5250**

Attorney Type: **Attorney Of Record** Atty. Status: **Active**

## Attorney/Firm For Defendant:

**ANDREW P. WEISS**  
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**212 737-0950**

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**MOSKOWITZ & BOOK & WALSH LLP**  
**345 SEVENTH AVE. 21TH FLOOR**  
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**212-221-7999**

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**BINGHAM MCCUTCHEEN LLP**  
**ONE BATTERY PARK PLAZA-34TH FL**  
**NEW YORK, NEW YORK 10004**  
**1-917 777-4343**

Attorney Type: **Attorney Of Record** Atty. Status: **Active**[Close](#)[Show All Appearances](#)[Show Motions](#)[Show Decisions](#)[Add to eTrack](#)